

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

WILLIAM A. HERZOG,	)	
	)	
Appellant,	)	PCHB No. 88-68
	)	
v.	)	
	)	FINAL FINDINGS OF FACT,
PUGET SOUND AIR POLLUTION	)	CONCLUSIONS OF LAW
CONTROL AGENCY,	)	AND ORDER
	)	
Respondent.	)	

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This matter came on for hearing on Wednesday, March 15, 1989, in Lacey, Washington, before the Pollution Control Hearings Board; Wick Dufford, presiding, Judith A. Bendix and Harold S. Zimmerman.

Appellant William A. Herzog was represented by William B. Wood, attorney at law. Respondent Puget Sound Air Pollution Control Agency (PSAPCA) was represented by Keith D. McGoffin, attorney at law. The proceedings were recorded by Lisa Alger of Eugene Barker and Associates.

1           Witnesses were sworn and testified. Exhibits were admitted and  
2 examined. From the testimony heard and exhibits examined, the  
3 Pollution Control Hearings Board makes the following

4                               FINDINGS OF FACT

5                               I

6           William Kydd is the owner of the Aloha Apartments located at  
7 561 Aloha Avenue in Seattle, Washington. In the fall of 1985,  
8 Mr. Kydd hired George Weller to perform remodeling work at the Aloha  
9 Apartments, including the removal of an old boiler.

10                              II

11           PSAPSA is a municipal corporation with authority to carry out a  
12 program of air pollution prevention and control in a geographic area  
13 which includes Seattle. Certified copies of PSAPCA's Regulation I  
14 have been filed with this Board and the Board takes official notice of  
15 those regulations.

16                              III

17           Prior to October 23, 1985, Mr. Kydd departed from Seattle and  
18 went on a trip to Africa. In his absence William Herzog was left to  
19 perform certain duties, primarily of a financial nature, in the  
20 management of Kydd's properties. A resident manager was also in place  
21 at the Aloha Apartments.

22                              IV

23           In the afternoon of October 23, 1985, the resident manager at the  
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26 FINAL FINDINGS OF FACT,  
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1 Aloha Apartments called PSAPCA to report what he suspected was an  
2 asbestos removal violation in the boiler room. The resident manager  
3 then advised Herzog of what he had done.

4 Previously unaware of any construction work at the apartments,  
5 Herzog ascertained that the work was being performed by George Weller  
6 and his crew. He contacted Weller by phone and advised that a PSAPCA  
7 inspection of the job was imminent.

8 PSAPCA's inspector inspected the boiler removal job at the Aloha  
9 Apartments in the early evening of October 23 and found dry insulation  
10 debris left on the floor of the boiler room and a trail of such debris  
11 out to a nearby dumpster. The dumpster, normally used for tenant's  
12 household trash, contained fragments of the same dry insulation debris.

13 Subsequently, samples of the debris were analyzed and found to  
14 contain a substantial percentage of both amosite and chrysotile  
15 asbestos.

16 V

17 Prior to leaving the site, PSAPCA's inspector taped the dumpster  
18 closed with duct tape. She also telephoned Mr. Herzog and explained  
19 the situation. She directed that the problem be cleaned up by a  
20 qualified contractor.

21 On the following morning, PSAPCA's inspector contacted local  
22 health officials and asked them to prevent pick up of the dumpster  
23 until the asbestos had been removed. The health department placed a  
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26 ; FINAL FINDINGS OF FACT,  
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1 sign and additional tape on the dumpster. PSAPCA suggested to Herzog  
2 that a lock be placed on the dumpster. This was never done.

3 VI

4 Thereafter, without Herzog's involvement, Weller received the  
5 services of a qualified asbestos removal contractor to perform the  
6 clean up. On October 31, 1985, the qualified contractor was on site,  
7 and advised PSAPCA by phone that the dumpster had been dumped and the  
8 asbestos was no longer in it.

9 VII

10 Three Notices of Violation were issued by PSAPCA in connection  
11 with the October 23, 1985 inspection. Three separate violations were  
12 alleged: 1) failure to adequately wet asbsestos materials to ensure  
13 they remain wet until collected for disposal; 2) failure to seal all  
14 asbestos containing waste material in leak-tight containers while wet;  
15 3) asbestos removal without prior written notice to the agency.

16 All three of these Notices were issued to both Herzog and Weller.

17 VIII

18 A fourth Notice of Violation was issued to Herzog and Weller in  
19 connection with the discovery of the emptied dumpster on October 31,  
20 1985. The violation alleged was failure to seal all asbestos  
21 containing waste material in leak-tight containers while wet.

22 IX

23 Subsequently, on January 27, 1986, PSAPCA issued jointly to  
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26 FINAL FINDINGS OF FACT,  
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1 Herzog and Weller a Notice and Order of Civil Penalty (No. 6400),  
2 assessing a fine of \$1,000 for the violations alleged in the Notices  
3 of Violation.

4 X

5 Weller, but not Herzog, appealed the civil penalty to this  
6 Board. On April 23, 1986, Weller's appeal was dismissed on motion of  
7 PSAPCA because it was not filed within the jurisdictional thirty (30)  
8 day appeal period. Weller v. PSAPCA, PCHB No. 86-41 (1986).

9 Thereafter PSAPCA brought a suit to collect the penalty against  
10 both Herzog and Weller. In the course of the collection lawsuit, on  
11 May 3, 1988, the King County Superior Court ordered the matter stayed,  
12 pending an appeal by Herzog to this Board. Herzog thereupon filed the  
13 instant appeal on May 17, 1988. The appeal was assigned PCHB  
14 No. 88-68.

15 XI

16 On October 20, 1988, PSAPCA filed a Motion for Summary Judgment  
17 in this matter. On November 15, 1988, Herzog filed a Cross Motion for  
18 Summary Judgment. On November 23, 1988, the Board denied both motions  
19 on review of what was then in the record, concluding:

20 . . . We are not convinced that the pleadings,  
21 answers to interrogatories and affidavits on file  
22 show that there is no genuine factual issue as to  
23 whether Mr. Herzog was at the time in question an  
"owner or operator" in relation to the events  
alleged.

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26 FINAL FINDINGS OF FACT,  
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XII

After review of the sworn statements submitted at the hearing, the testimony of Mr. Herzog and the documents admitted, we find that Mr. Herzog did not, in fact, exercise any authority or control over the actions of Mr. Weller or his workers in connection with the actions giving rise to the violations charged.

Mr. Herzog did not hire Weller. Herzog was unaware that Weller was carrying on the work in the boiler room, until advised of the asbestos debris problem by the resident manager.

Supervision of construction activities at the Aloha Apartments was beyond the scope of Herzog's employment. When contacted by PSAPCA, Herzog attempted to be cooperative and to assist in seeing that the agency's instructions were followed. However, Herzog never visited the scene, nor took any part in the activities on site.

XIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to the following

CONCLUSIONS OF LAW

I

The Pollution Control Hearings Board has jurisdiction over the parties and the subject of this appeal. Chapter 70.94 RCW, Chapter 43.21B RCW.

FINAL FINDINGS OF FACT,  
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II

The civil penalty at issue is based on violations applicable under WAC 173-400-075, a state regulation which incorporates provisions of the federal regulations in 40 CFR Part 61 relating to asbestos removal. PSAPCA has authority to enforce such regulations. RCW 70.94.331(6).

III

The federal regulations cited by PSAPCA (40 CFR 61.146; 61.147(e)(1); and 61.152(b)(1)(iii)) all refer to requirements imposed on an "owner or operator" of a demolition or renovation operation. 40 CFR 61.145.

The definition in 40 CFR 61.02 states:

"Owner or operator" means any person who owns, leases, operates, controls or supervises a stationary source.

From the Environmental Protection Agency's commentary on these regulations, when promulgated, 49 Federal Register 13659 (April 5, 1984), it is clear that the term "owner or operator" applies both to the contractor doing demolition or renovation work in a building and to the owner or operator of the building itself. EPA construes the air pollution "source", however, to be the demolition or renovation operation. The building owner or operator becomes an "owner or operator" of such a source by purchasing the services of the contractor, thereby acquiring ownership and control of the operation.

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IV

We conclude that Herzog was not an "owner or operator" as that term is intended to apply in asbestos removal operations. He is not the owner of the building involved. He did not become an "owner or operator" of the renovation operation because he did not purchase Weller's services. Moreover, he exercised no authority over what Weller did.

V

All of the violations asserted here are traceable to activities which occurred before Herzog even knew that the work was being performed. This is patently evident as to the alleged violations of October 23, 1985.

It is also true as to the violation alleged to have occurred on October 31, 1985. That violation is a continuation (see RCW 70.94.431) of the violation for failure to seal all asbestos-containing materials (while wet) into leak-tight containers. The conditions giving rise to the charge were created by Weller's workmen prior to PSAPCA's initial inspection. Herzog did not, somehow, assume control over the renovation operation by his communications with PSAPCA.

VI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters the following

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

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(8)



ORDER

The Notice and Order of Civil Penalty insofar as it relates to William A. Herzog is REVERSED.

DATED this 3d day of October, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford  
WICK DUFFORD, Presiding Officer

Judith A. Bendor  
JUDITH A. BENDOR, Chair

Harold S. Zimmerman  
HAROLD S. ZIMMERMAN, Member

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